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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 615

CHARLES W. GAMMONS ET AL., EXECUTORS AND TRUSTEES, PETITIONERS

v.

THOMAS B. HASSETT, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 38–41) is reported in 36 F. Supp. 529. The opinion of the Circuit Court of Appeals for the First Circuit (R. 111–121) is reported in 121 F. (2d) 229.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 27, 1941 (R. 121). The petition for a writ of certiorari was filed September 15, 1941. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where an estate was left in trust to the testator's widow for life, with the express power to invade the principal of the estate to the extent that she might at any time need or desire, with a remainder over to charity, is the bequest to charity sufficiently definite and ascertainable as of the date of the testator's death to be exempt from estate tax under Section 303 (a) (3) of the Revenue Act of 1926?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, 44 Stat. 9:

> SEC. 303. For the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> * * * * *
>
> (3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * *. (U. S. C., Title 26, Sec. 412.)

Treasury Regulations 80 (1934 Ed.):

> ART. 44. *Transfers for public, charitable, religious, etc., uses.*—* * *

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use.

* * * * *

ART. 47. *Conditional bequests.*—* * *

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

STATEMENT

The facts, as stipulated (R. 11–14) and as found by the District Court (R. 38–39), may be summarized as follows:

Bryan R. Houghton died on June 30, 1936, at the age of 92, leaving a widow, Mary F. Houghton, aged 93. The couple had no children (R. 11, 38). Petitioners are the executors of Mr. Houghton's estate as well as the trustees under his will (R. 12). Article III, paragraph 1, of Mr. Houghton's will (R. 16–17) provides that the residuary estate should be given to trustees

* * * to be held by them, the income thereof, after paying all reasonable expenses

> of the trust, including a reasonable compensation for the services of my Trustees, and so much of the principal thereof as my said wife may at any time and from time to time need or desire, to be paid to my said wife during her life.

Paragraph 3 of Article III directs the trustees, upon the death of Mrs. Houghton,

> * * * to transfer, make over and distribute the rest, residue and remainder of my estate to the New England Grenfell Association, of 25 Huntington Avenue, Boston, Massachusetts, and the Society for Prevention of Cruelty to Animals, of Boston, Massachusetts, share and share alike, free and discharged of any trust.

It is agreed that the New England Grenfell Association and the Society for Prevention of Cruelty to Animals are charitable corporations.

At the time of Mr. Houghton's death his gross estate had a fair valuation of approximately $275,000. On the same date his wife's property had a fair valuation of approximately $190,000. The Houghtons had lived for more than forty years in a house worth about $7,000. Their wants and mode of life were very conservative and their combined income, which varied between $15,000 and $25,000 per year, was greatly in excess of their needs (R. 39).

At the time of her husband's death, Mrs. Houghton was bedridden and had been unable to handle

her affairs for about two years. During this period Mr. Houghton had given her much assistance in that respect. After his death it was necessary to appoint a conservator for her. She is mentally alert though still confined to her bed (R. 38).

Mrs. Houghton, by a codicil executed May 29, 1936, coincidentally with the execution of Mr. Houghton's last codicil, had left the residue of her estate after her husband's death to the trustees under his will to be added to the trust that he had set up for the benefit of the two charities referred to therein (R. 39).

In the federal estate tax return filed by petitioners a deduction in the sum of $170,779.04, being the alleged value of the decedent's residuary estate, was claimed for a charitable gift (R. 12–13). The Commissioner disallowed this deduction and assessed a deficiency accordingly (R. 13–14). Petitioners paid the amount of the deficiency to respondent as Acting Collector of Internal Revenue, filed a claim for refund which was disallowed, and then instituted the present suit (R. 14). The trial court denied recovery (R. 41) and the court below affirmed (R. 121).

ARGUMENT

The court below properly concluded that as of the date of death, the bequest to charity was indefinite and unascertainable as to amount, because of the unlimited power given the life tenant to

invade the principal of the estate at any time she might desire. The widow's right to demand a part or all of the corpus of the estate was not limited or restricted to her needs, or in any other way. Only in the event that she should die without having used the corpus of the estate for her own purposes would the charitable organizations be entitled to anything. Cases of this type must be governed by the existence of the power rather than the likelihood of its use, as shown by the extrinsic circumstances, which, of course, vary in each particular case.

Ithaca Trust Co. v. *United States,* 279 U. S. 151, and *United States* v. *Provident Trust Co.,* 291 U. S. 272, upon which petitioners primarily rely (Pet. 6), are clearly distinguishable. In the *Ithaca Trust Co.* case, the life tenant could only invade the corpus of the trust if *necessary* to continue the comfort then enjoyed. The standard was fixed in fact and since the income was more than sufficient to meet that standard the power there was not such as to make the gift over to charity uncertain. In the case at bar, however, the power to invade the principal was not restricted to the life tenant's needs; rather, she could at any time and for any reason use more than the income. Accordingly, the court below properly concluded (R. 117) that there was no standard fixed in fact by which it could measure either the extent of the life tenant's desires or the

likelihood of the exercise of those desires. See *Humes* v. *United States,* 276 U. S. 487; *Knoernschild* v. *Commissioner,* 97 F. (2d) 213 (C. C. A. 7).

In the *Provident Trust Co.* case, *supra,* the estate was left to the daughter of the deceased for life, then to her issue, and if she died leaving no issue, then to charity. This Court ruled that since it was impossible for the daughter to have issue because of an operation, there was no uncertainty in connection with the bequest to charity. The court below properly observed (R. 116) that both that case and the *Ithaca Trust Co.* case, *supra,* involved a quality of certainty not present in the instant case.

Similarly, the decisions of the circuit courts of appeals cited by petitioners [1] (Pet. 11–13) are not controlling since their facts differ in critical respects. In all, the degree of certainty that the charitable bequest would take effect was far greater, and in none was the charity's ultimate receipt dependent wholly upon the unrestricted wishes of an individual.[2] The characteristic dis-

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[1] Petitioner cites these cases in support of the proposition that "the uncertainty affecting deductibility is a question of fact and not of form" (Pet. 11). We do not dispute this.

[2] *City Bank Farmer's Trust Co.* v. *United States,* 74 F. (2d) 692 (C. C. A. 2) involved a life estate in the testator's daughter, then to her issue, and then to charity. The daughter was 59 years old, and without issue at the testator's death. The court, relying on birth statistics, ruled that there was no

tinguishing the instant case is simply that here the widow was vested with the broadest power to use so much of the corpus as she might "desire." Such power carries into the realm of speculation the ultimate benefits, if any, which the designated charities might receive.[3]

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uncertainty. In both *Hartford-Connecticut Trust Co.* v. *Eaton*, 36 F. (2d) 710 (C. C. A. 2) and *First Nat. Bank* v. *Snead*, 24 F. (2d) 186 (C. C. A. 5), only the trustee had power to invade the corpus, and then only to the extent that he deemed necessary or advisable for the beneficiary's comfortable maintenance and support. In both cases the income was clearly adequate to support the beneficiary according to her station in life. In *Commissioner* v. *F. G. Bonfils Trust*, 115 F. (2d) 788 (C. C. A. 10), the corpus could be invaded only if necessary to meet fixed annuities. The annuitants were elderly and the income from the trust was almost five times the amount required to pay the annuities.

Brown v. *Commissioner*, 50 F. (2d) 842 (C. C. A. 3) and *St. Louis Union Trust Co.* v. *Burnet*, 59 F. (2d) 922 (C. C. A. 8) are not in point. Both concerned the sufficiency of description of charitable objects. Insofar as the *St. Louis Union Trust Co.* case dealt with the issue of certainty, it was decided contrary to the taxpayer in that case.

[3] The circumstances might well be such that the widow might choose to invade the corpus for far less whimsical reasons than the desire to spend extravagantly: While indeed it is unlikely that she would "blossom out with a desire to buy a yacht," it is not impossible that changing circumstances might lead her to choose charities or causes different from those designated by the testator.

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions. The petition for writ of certiorari should be denied.

Respectfully submitted.

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